

# **A GUIDE:**

## **To Dispute Resolution Procedures Used by the Federal Service Impasses Panel**

**Federal Service Impasses Panel**  
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This Guide is to inform employer and union representatives about the procedures used by the Panel to resolve impasses in negotiations. It is not to be considered an official interpretation of the Federal Service Labor-Management Statute, 5 U.S.C. § 7119, or the Panel's regulations, 5 C.F.R. § 2470, et.seq.

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## **INTRODUCTION**

**T**he Federal Service Impasses Panel (Panel) has broad statutory authority to resolve negotiation impasses over conditions of employment in the Federal sector. Once it determines to assert jurisdiction in a dispute, the Panel may recommend or direct the use of procedures for resolving an impasse through any method it deems appropriate. If the procedure selected does not result in a settlement, the Panel may then take whatever final action is necessary to resolve the dispute, including the issuance of a *Decision and Order*. The *Order* is binding during the term of the parties' collective bargaining agreement unless the parties agree otherwise. Because the Panel believes that the voluntary resolution of impasses are superior to those imposed by a third party, after considering the parties' preferences, where circumstances warrant the Panel will select the procedure most likely to lead to a voluntary settlement. Consistent with this belief, the Panel encourages the parties to continue efforts to resolve the issues voluntarily at any stage of case processing.

**T**he Guide is intended to describe those procedures most commonly used by the Panel, but does not include them all. Throughout its history, the Panel has been innovative in creating new procedures designed to meet the changing needs of Federal sector impasse

resolution. In conjunction with any procedure, the Panel may, on occasion, introduce variations as well. After consulting with the parties, for example, the Panel may determine that time and efficiency require conducting the selected procedure by telephone conference. When presented with special circumstances or a novel issue, as a second step, the Panel may issue a *Report and Recommendations for Settlement*. This additional procedural step gives the parties an opportunity to consider and comment on a recommended settlement before a final decision is issued. In some cases, the Panel may use "final-offer selection," which limits the decision-maker to selecting between the parties' final offers on an issue-by-issue, article-by-article, or package basis, insofar as they otherwise appear to be legal. Final-offer selection is intended to provide the parties with an incentive for making their proposals as reasonable as possible. If it is used in connection with any procedure, the parties will always be notified in advance.

## THE PARTIES' RESPONSIBILITIES

The Panel's unique role as the Federal sector substitute for the strike and the lock-out requires it to bring finality to those disputes where jurisdiction is asserted. In turn, the parties bear the ultimate responsibility for ensuring that the Panel is fully informed when it deliberates over the merits of their case. During any procedure under the Panel's auspices, therefore, each party must be ready to explain how its proposal works, and to support its adoption by providing clear and complete statements of position, either orally or in writing. The most common criteria the Panel applies in assessing the merits of proposals are **demonstrated need** and **comparability**. For instance, when one party proposes to change the *status quo*, that party is obligated to demonstrate the need for the change. In addition, when other workplaces in the private, public, or Federal sector are currently governed by a practice which a party would like to see adopted, the existence of the practice should be documented and evidence should be produced to substantiate that the employees who would be affected are similarly situated. In sum, whenever a party participates in a procedure under the Panel's auspices, there is no substitute for thorough preparation and collection of data in advance to be used in persuading the Panel that its proposal should be imposed to resolve the dispute.

# JURISDICTIONAL QUESTIONS

In the course of investigating a request for assistance, a party may claim that a matter is outside its duty to bargain. If subsequent research reveals that the claim appears to be frivolous, the Panel will not permit it to block the handling of an impasse. In certain circumstances such as a multi-issue impasse where the claim raises a serious question, the Panel may nevertheless determine to assert jurisdiction in an attempt to work around the matter, with the goal of assisting the parties in resolving the entire dispute.

## PROCEDURES

The following is a description of some of the procedures the Panel uses after it asserts jurisdiction in a case. If a more thorough understanding of the procedures is necessary, Panel representatives may be contacted directly at **(202) 482-6670** for additional information. Moreover, the Panel representative initially assigned to investigate a case will provide a detailed explanation of various procedures when soliciting the parties' preferences. While such preferences are given serious consideration, the Panel ultimately selects the procedure that, in its view, is best designed to address the particular circumstances presented. From time to time the Panel meets with its customers around the country to provide training on the Panel's processes and to engage in a dialogue intended to elicit their concerns. Parties are encouraged to contact the Panel in advance when planning sizable training conferences to arrange for Panel participation.

### 1. Resumption of Negotiations on a Concentrated Schedule

- With Mediation Assistance, as Necessary or Required

When the Panel believes that further bargaining may resolve a dispute or at least serve to narrow the issues, it may send the parties back to the bargaining table on a specified, concentrated schedule, normally over a 15, 30, or 45-day period. In one variation of this procedure, during the resumed bargaining the parties may secure assistance from FMCS when they believe it is necessary. The parties will be asked to submit a status report to the Panel at the conclusion of the concentrated effort. If they do not reach a complete settlement, the Panel may then direct another procedure, which often results in the issuance of a binding decision. In another variation of the procedure, the Panel itself may arrange in advance a schedule of resumed negotiations with the

FMCS mediator who was previously involved in the case. Regardless of which variant is utilized, the Panel also sometimes informs the parties in the letter directing them back to the table that if a complete settlement does not occur during the specified period of negotiations, the Panel will be restricted to selecting from between their final offers on either an issue-by-issue, article-by-article, or package basis. This usually occurs in only the most difficult impasses where the Panel believes that maximum pressure should be brought to bear on the parties to assist the mediator in his or her efforts at voluntary settlement.

- With CADRO Intervention

The FLRA's Collaboration and Alternative Dispute Resolution Office (CADRO) is part of an agency-wide initiative to help parties avoid formal litigation by using an interest-based approach in a variety of disputes. In selected cases, after consulting with and receiving the prior approval of the parties, the Panel may refer the parties to CADRO for assistance while retaining ultimate jurisdiction of the impasse. At the end of this process, however, should the dispute remain, CADRO lacks the statutory authority to impose a resolution on the parties. For this reason, if CADRO's interest-based intervention is unsuccessful, the Panel will select an appropriate procedure for resolving the impasse.

## **2. Informal Conference**

To maximize the parties' opportunity to reach a voluntary resolution of the dispute, a Panel-appointed representative (usually a Panel or Staff member) explores settlement possibilities with the parties in a face-to-face setting. Discussions between the parties and the representative, who is well-versed in how the Panel has decided previous cases involving similar issues, take place across the bargaining table and in caucus sessions. Often these explorations result in a voluntary settlement of some or all of the disputed issues. Should such efforts prove unsuccessful, the procedure permits the Panel representative to gain a full understanding of the parties' justifications, demonstrated needs, and other evidence presented on the merits. The representative then reports to the full Panel at a subsequent Panel meeting; the report includes the parties' final offers, any statements of position the parties are required to submit by the representative, and his or her recommendations for settlement. The Panel then takes final action on the matter, which could include issuing a *Decision and Order*. The informal conference historically has been the Panel's most effective, yet most misunderstood, procedure. It has permitted numerous parties to craft the resolution to their own dispute in

an interest-based, non-litigious setting. The interchange of ideas, with the guidance of a Panel representative, increases the possibility for a more satisfactory resolution than a decision imposed by the Panel. Where a voluntary settlement does not occur, the procedure preserves the Panel's discretion to resolve issues which it believes should be decided by the full Panel in plenary session.

### **3. Mediation-Arbitration ("Med-Arb")**

- With A Panel Representative

To provide the parties with a final opportunity to resolve the dispute themselves at this late stage of the negotiation process, a Panel-appointed mediator-arbitrator begins by exploring possible areas of agreement. Often, the procedure leads to a settlement because the arbitrator's suggestions during mediation are not apt to be taken lightly. The procedure is normally less formal than grievance arbitration, but may vary depending upon the Panel representative involved and the nature of the issues. If a voluntary agreement does not occur during the mediation phase, an arbitration hearing then immediately follows. At his or her discretion, the arbitrator may swear witnesses, receive exhibits into evidence, or require the submission of pre- or post-hearing briefs. Regardless of the nature of the hearing, however, the arbitrator ultimately has the authority to render a binding arbitration decision on those issues not resolved during the mediation portion of the procedure. There is no charge for the arbitrator's services.

- With A Private Arbitrator (Private "Med-Arb")

The Statute authorizes the parties to voluntarily submit their dispute to a private mediator-arbitrator after a joint request from the parties to use the procedure has been approved by the Panel. These joint requests are investigated on an expedited basis, and generally approved, unless they involve matters which the Panel reserves to itself, such as issues of first impression for the Federal sector labor relations community. In other cases not involving joint requests, the Panel may recommend and/or direct the use of private med-arb or arbitration as well. Under either scenario, the parties select the arbitrator who will handle the case and share the arbitrator's fees and other associated expenses. In other respects, the procedure is similar to med-arb with a Panel representative.

The information the parties should submit in a joint request for Panel approval of private med-arb is outlined in the Panel's regulations. Of particular note, as part of their joint request, the parties are required to submit statements regarding: (1)

whether any of the proposals to be presented to the arbitrator contain questions concerning the duty to bargain, and (2) the arbitration procedure to be used or, in the alternative, those provisions of the parties' labor agreement which contain this information. Although the Panel does not recommend particular arbitrators, it will, upon request, direct the parties to FMCS for a list of arbitrators.

- Expedited Arbitration with a Panel Representative

When a quick resolution is a crucial factor in the circumstances of a case, and the issues are neither too numerous nor overly complex, the Panel may direct an expedited arbitration procedure. A Panel-appointed arbitrator meets with the parties to hear both sides of the dispute and, if a settlement is not reached, will issue a binding decision within 2 workdays of the close of the hearing. Given the short time-frame, the parties are not permitted to file post-hearing briefs, although they may be given permission to submit statements and documentary evidence in advance. These and other details of the proceeding are left to the discretion of the arbitrator. In other respects, the procedure is similar to med-arb with a Panel-appointed arbitrator.

- Arbitration with a Panel Representative or Private Arbitrator

This procedure gives the parties the opportunity to present the justifications and demonstrated needs, including documentary evidence, for their positions on the merits directly to the decision-maker. The parties, at the arbitrator's discretion, may have an opportunity to file statements, either before or after the proceeding. As opposed to the other varieties of arbitration listed in this Guide, traditional arbitration is normally recommended or directed where the Panel's initial investigation demonstrates that the parties are so entrenched in their positions that additional mediation is highly unlikely to produce any movement. Nevertheless, the parties should not be surprised if the arbitrator spends some time exploring settlement possibilities with them

## **4. Written Submissions**

- Single Written Submissions/Initial Statements of Position and Rebuttals

On a schedule established by the Panel, the parties present the merits of their positions in writing, normally within specified page limitations. They also may submit supporting evidence in the form of documents, affidavits, graphs, charts, and video tapes. The parties are to serve these materials on each other and the Panel (two copies). In addition to the initial filing, if so directed, they may submit rebuttal statements. Following

consideration of the parties' submissions, the Panel will take final action, which could include issuing a *Decision and Order*. Since the parties do not engage in a dialogue with a Panel representative, there is less opportunity for a voluntary settlement. Because there also is no opportunity for the Panel's representative to ask questions, it is essential that the parties explain their proposals and persuasive evidence clearly and completely. When the record requires clarification, the Staff may conduct a telephone conference call to resolve any uncertainties.

- Order To Show Cause

When the issues presented are substantively similar to those addressed in a previous Panel decision the Panel may issue an *Order to Show Cause*. Under this procedure, the parties are asked to show cause why specific wording or other solutions previously imposed by the Panel should not be applied to resolve the dispute in the case at hand. Once it has considered the parties' submissions, which may include supporting evidence in the form of documents, affidavits, graphs, charts, and video tapes, and the parties' final offers, the Panel will take final action, normally the issuance of a *Decision and Order*, to resolve the impasse. This procedure is intended to focus the parties' attention on distinguishing the circumstances of their case from those the Panel has considered in the past.

## 5. Factfinding

- By a Panel Representative With Recommendations for Settlement

In important disputes involving issues of first impression, heightened public interest, or of a highly technical nature, a factfinding hearing creates a complete record of documentary evidence and expert witness testimony on which to base a decision. It is the most formal of the Panel's procedures. A pre-hearing conference is conducted to facilitate preparations for the hearing and to explore settlement possibilities. To expedite the process, the Panel asks parties to stipulate through joint exhibits to any facts that are not in dispute. During the factfinding hearing, the Panel representative (factfinder) in charge of the proceeding has the authority to issue subpoenas, and to allow the parties to call witnesses who are under oath. The parties may question the witnesses through direct and cross examination; the factfinder may also question the witnesses and the parties' representatives as necessary to ensure that a complete record is created. An official transcript of the proceeding is made; the parties make arrangements to purchase copies from the court reporting service for their own use. Afterwards, the parties are normally permitted to submit post-hearing briefs. The factfinder issues a report

summarizing the evidence and arguments presented, the parties' final offers and positions, and his or her recommendations for settlement. Copies of the report are sent to the parties, who have 30 days in which to reach an agreement or present their reasons, in writing, as to why the factfinder's recommendations should or should not be adopted. If the issues are not resolved as a result of the factfinder's recommendations, after considering the entire record, the Panel subsequently takes final action on the matter, usually by issuing a *Decision and Order*. For further information, the parties should refer to *A Guide to Hearing Procedures of the Federal Service Impasses Panel*.

- By a Panel Representative Without Recommendations for Settlement

This procedure is identical to factfinding with recommendations, except that the factfinder is not given the authority to provide the parties with his or her recommendations for resolving the dispute. In such cases, the factfinder's responsibility is complete upon the issuance of a factfinder's report within a period normally not to exceed 30 calendar days after the receipt of the transcript or post-hearing briefs, if any. The report summarizes the evidence and arguments presented, and the parties' final offers and positions. The Panel then takes whatever action it may consider appropriate or necessary to resolve the impasse, which most often takes the form of a *Decision and Order*.

- Private Factfinding (With or Without Recommendations for Settlement)

In certain circumstances, often but not always with their concurrence, the Panel may direct the parties to hire a mutually acceptable private individual to conduct a factfinding hearing. The parties share all of the expenses of the private factfinder they select to conduct the proceeding. Although the private factfinder is without authority to issue a binding decision to resolve the parties' impasse, he or she normally has latitude in determining scheduling and the manner in which the proceeding is conducted. As in those cases where one of its own representatives is designated to conduct a factfinding hearing, the Panel requires that an official transcript of the proceeding be submitted to it along with the private factfinder's report. In those instances where the private factfinder is granted the authority to make recommendations to the parties and the Panel for settlement of the dispute, the parties have 30 days in which to reach an agreement or present their reasons, in writing, as to why the private factfinder's recommendations should or should not be adopted. If the issues are not resolved as a result of the private factfinder's recommendations, after considering the entire record,



the Panel subsequently takes final action on the matter, usually by issuing a *Decision and Order*. If the private factfinder has not been given the authority to make recommendations for settlement, his or her responsibility is complete upon the issuance of the private factfinder's report summarizing the evidence and arguments presented, and the parties' final offers and positions. The Panel then takes whatever action it may consider appropriate or necessary to resolve the impasse, which most often takes the form of a *Decision and Order*.

## **FEDERAL SERVICE IMPASSES PANEL**

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